Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD LARIVIERE,
Petitioner,

v.

HELEN LARIVIERE
Respondent,

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The Probate Court sanctions, issued ostensibly under Mass. R. Dom Rel. Rule 37(b)(2)(B), prohibiting the Petitioner from opposing *any* evidence or presenting *any* evidence at his divorce trial, constitutes a violation of the Petitioner's Fifth Amendment rights against self incrimination and Fourteenth Amendment Rights to due process and a fair trial under the United States Constitution?

2. Whether The Massachusetts Appeals Court's judgment, affirmed by the Massachusetts Supreme Judicial Court, is in direct conflict with the holding of a United States Court of Appeals decision concerning an important federal constitutional rights of client privacy, confidentiality and attorney disqualification due to conflicts of interest?

3. Whether the Massachusetts Probate Court's allowance of a post trial motion amending the Divorce Judgment to eliminate a ten million dollar contractual compensation right of the Petitioner 53 days after the Divorce Judgment, in direct violation of the 10 day time limits established by Mass. R. Dom. P. Rules 4(e) and 59(b), constitutes a prejudicial error, manifest injustice and the denial of Petitioner's constitutionally protected property rights without due process and his rights under the Full Faith and Credit Clause pursuant to Article IV section 1?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Massachusetts Supreme Judicial Court. The Petitioner is Richard Lariviere. The Respondent is Helen Lariviere.

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IN THE

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No. 09-__

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OPINIONS BELOW

The Judgment of Divorce was granted after trial by the Honorable Susan Ricci, of the Massachusetts Probate & Family Court. (hereinafter, Probate Court) (A. 14) The Order on Motion for Relief from Judgment was entered May 21, 2008. (A. 14) The opinion of the Court of Appeals was published pursuant to S.J.C. Rule 1:28; (A. 2) The Massachusetts Supreme Judicial Court denied Petitioner's application for further appellate review on January 27, 2010.(A. 1)

JURISDICTION

The Federal Code at 28 U.S.C. s.1257 permits review by certiorari of a final judgment of the highest court of a state, premised upon issues regarding

federal law. This case involves issues of due process under the Fourteenth Amendment to the Constitution of the United States and the Petitioner's constitutional rights under the Full Faith and Credit Clause contained in Article IV section 1 of the Constitution of the United States. The Massachusetts Probate Court's divorce judgment assigning to the wife, Petitioner's Delaware LLC's, is beyond the power of the Massachusetts Probate Court, is in conflict with Delaware law and is void. (A. 34)

Supreme Court review is also warranted under Supreme Court Rule 10(b), when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. The Massachusetts Supreme Judicial Court affirmed the Massachusetts Appeals Court after they decided an important federal question with respect to constitutional due process, full faith and credit and the privacy rights implications of successive legal representation, as it relates to the denial of the Petitioner's motion to disqualify opposing counsel for a conflict of interest. (A.10) Petitioner also claims original jurisdiction under 28 U.S.C. s.1251.

STATEMENT OF THE CASE

This case presents a critically important question concerning whether this Massachusetts Probate Court's exercise of jurisdiction and power to effect property rights in two (2) Delaware LLC's which comprise a substantial portion of this marital estate subject to equitable distribution upon divorce, unconstitutionally collided with Petitioner's property rights and due process rights under the United States Constitution. (A. 34) The Delaware legisla ture intended when it enacted 6 Del. C. s.18-703(a)(d)

and (f)), to provide for fair and predictable dissolution process for one's equity ownership interest in a Delaware LLC, consistent with due process and the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution. (A. 34) Plaintiff suffered a catastrophic loss of money without the, right to offer evidence or appeal and when a state probate court assigned two Delaware LLC's to Petitioner's wife in a divorce decree. Moreover, Petitioner claims that the unlawful allowance of a motion to amend the divorce judgment under Mass. R. Dom. Rel Rule 60(b)(1), to forfeit Petitioner's 10 million dollar contractual benefits in (2) two Delaware LLCs, under Delaware operating agreements constituted manifest injustice and an unconstitutional deprivation of Petitioner's property rights without due process of law. (A. 34) Petitioner alleges the Probate Court's discovery sanctions imposed as a result of his refusal to be compelled to take a pre trial deposition which unfairly and unconstitutionally penalized him for exercising his constitutional rights against compelled self incrimination under the Fifth Amendment. Additionally, The wife's divorce trial counsel's failure to disqualify for conflict of interest, deprived plaintiff the right to a due process and a fair trial under the Fourteenth Amendment to the United States Constitution.(A. 10)

The Petitioner asserts that the Massachusetts Supreme Judicial Court's decision to affirm the Probate Court's divorce judgment, as amended, unconstitutionally deprived him of his property rights without due process of law and that the Court failed to grant full faith and credit to the clear statutory mandates under Delaware law. The Petitioner further asserts that fundamental fairness and the unambiguous exclusive provisions of laws of the State of Delaware

require that the Judgment of Divorce assigning these Delaware LLC's to the wife be vacated and a new trial be ordered.

A. Factual Background:

The parties were married on April 27, 1968, and they have two emancipated children of the marriage. Petitioner was born on April 20, 1940, and the Wife was born on December 5, 1942. The Wife was the primary care giver for the children prior to their emancipation and she is a licensed cosmetologist. The Petitioner worked for his father's residential rental business from the time of the marriage until 1984, when he purchased residential rental business from his father. The Petitioner attended college and has a degree from the Institute of Real Estate.

On August 21, 2001, Highland Associates of Worcester No. 1, LLC, and consent to use name No. 2, LLC, were filed in Delaware under the Delaware Limited Liability Company Act (Title 6). (A. 12, 34)

B. Proceedings Below

On March 14, 2003, Helen Lariviere (the "Wife"), filed a Complaint for Divorce for irretrievable breakdown of her marriage against Petitioner, Richard J. Lariviere. On June 27, 2003, Petitioner filed an Answer admitting to the breakdown.

On May 2, 2005, Bowditch & Dewey (B&D) counsel, Michael Angelini, Esq. filed an appearance for the wife in the Massachusetts Probate Court divorce matter. On September 15, 2005 the Petitioner was arrested for attempting to murder the Wife. On April 25, 2007 the Husband pleaded guilty to the crime in the Superior Court Department of the Trial Court for the Commonwealth of Massachusetts.

On November 29, 2005 the Petitioner filed a Motion to Disqualify the Wife's Attorney due to their prior representation of him which resulted in manifest injustice.

Petitioner asserted that attorneys from Bowditch & Dewey LLP of Worcester, MA (hereinafter "Bowditch & Dewey") represented him on numerous matters including his plans to develop a vacant parcel of real estate in 1999. (A. 27).

The Wife's attorney, and his partner, denied that Bowditch & Dewey ever represented petitioner individually asserting that they represented his corporation only in the past and therefore representation of his wife in this divorce was not a conflict of interest. (A. 20).

In March of 2007 the Husband provided copies of deeds demonstrating that the real estate development plans that the attorneys from Bowditch & Dewey worked on, concerned real estate that the Husband owned individually in 1999. (A. 13)

On October 25, 2006, (amended on January 10, 2008 for scrivener's error), the Court ordered sanctions to be imposed against the Husband should he fail to attend his deposition. (A. 8)

At the trial the Petitioner was prohibited from: presenting or opposing any evidence of financial circumstances or relevant Mass. G.L. Chapter 208, Section 34 factors necessary for the Court to make a fair determination in this case. (A. 8)

On November 7, 2006, the petitioner moved to stay discovery until after the his criminal case for crimes committed against the Wife. The Husband raised the issue that the sanction was an impermissible penalty

for his assertion of his rights against self incrimination under the Constitution. This motion was denied.

On November 20, 2007 a Judgment of Divorce Nisi entered along with her Procedural History, Findings of Fact & Rationale.

On November 29, 2007 the Petitioner filed a motion for a new trial, averring that the Court failed to make the necessary findings on the mandatory factors scheduled in G.L. c. 208 § 34, and that the Court failed to fix the nature and value of the two Delaware LLC business entities assigned to the Wife by the Judgment of Divorce. (A. 30)

The sole evidence of the value of the limited liability companies, were the undated tax assessed values of the real estate that companies owned and Petitioner was prevented by sanction of the court from producing evidence or objecting to evidence of values represented by the wife. (A. 14).

The Court held no hearings to supplement the Master's Findings of Fact, until the Wife's Motion for Relief from Judgment was heard on April 28, 2008. (A. 14)

Incredibly, the probate court ruled that Petitioner, the former client and current client, Helen Lariviere interests were not adverse in their divorce as a basis for denying plaintiff's motion to disqualify counsel.

Contrary to the Massachusetts Appeals Court and the Supreme Judicial Court's decision that Mr. Lariviere waived these property value issues for failing to object to the Master's Report, Petitioner presented clear and convincing evidence that he in fact did object to the Master's Report under Mass. R.

Civ. P. Rule 53(h)(3), and this appellate issue and others concerning assessed values versus appraised values should not have been waived and/or prevented from litigation due to discovery sanctions enforced at trial.(A. 28, 30)

The motion to disqualify counsel was denied and findings of fact were issued by Judge Ricci on December 27, 2005. Mass. R. Prof. C. Rule 1.16, Rule 1.9 or Rule 1.10, were not mentioned or discussed in the findings of fact. Although there was an admission by Attorney Angelini at the hearing that the marital assets were owned by Richard Lariviere individually, by admitting the non-existence of the corporate entity in 1999, the judge still found that defendants had not represented plaintiff individually. (emphasis added) (A. 80) Paragraph 4 of the judge's findings of fact cite the 1999, Land Court litigation as the only former representation by defendants of Highland Associates of Worcester, Inc., and not plaintiff personally, where other legal representations were alleged and proved by plaintiff; to wit a 1999, mental health disability claim representation in 1999, and other important real estate matters in 1986, which was revealed by defendants' own conflicts checks records produced under Rule 34.

The checks that were cashed by Bowditch and Dewey, clearly show that the entity Highland Associates of Worcester was a d/b/a in 1999, not a corporation or an LLC. (A. 12, 13, 27) This evidence contradicts defendants' representations that plaintiff paid with corporate checks and the Massachusetts Appeal's Court and the Supreme Judicial Court's affirmation of this important constitutional question of property rights, due process and attorney-client representation must be overturned and stands at the

center of Petitioner's writ for review. (A. 27) Contrary to public record, the Appeals Court decision adopted Ricci's indisputably erroneous finding based solely upon defendants' representation that Highland Associates of Worcester was incorporated and the 1999 deed restriction litigation in Land Court was the only former B&D representation of plaintiff, both of which plaintiff claims, were not the case. (A. 13)

The Husband filed a timely Notice of Appeal on the Probate Court on June 4, 2008. This case was docketed with the Appeals Court on August 7, 2008.

There was no written opinion rendered before his petition for further appellate review was denied. (A. 1)

REASONS FOR GRANTING CERTIORARI

I. The Probate Court sanctions, issued ostensibly under Mass. R. Dom Rel. Rule 37(b)(2)(B), prohibiting the Petitioner from opposing any evidence or presenting any evidence at his divorce trial, constitutes a violation of the Petitioner's Fifth Amendment rights against self incrimination and Fourteenth Amendment Rights to due process and a fair trial under the United States Constitution?

The Probate Court's order of sanctions dated October 25, 2005 would later be modified and applied mid-trial to read as follows:

> "To the extent that Mr. Lariviere refuses to respond to any proper discovery requests at such deposition, he shall be prohibited from presenting or opposing any evidence on financial circumstances *or* relevant Chapter 208, Section 34

factors necessary for the Court to make a fair determination in this case." (A. 7)

The sanctions imposed by the Probate Court judge during the divorce trial is an unconstitutionally excessive sanction against Petitioner that denied him due process rights with respect to his property, rights to a fair trial and rights against compelled criminal testimony. This sanction was issued when the Petitioner failed to attend a deposition by the wife's attorney prior to his criminal trial for crimes against his wife. (A. 8-9) The sanction caused the Petitioner to suffer an impermissible penalty for the assertion of his rights against self-incrimination, as protected by the 5th Amendment to the United States Constitution. The Petitioner asks this court to revisit this important constitutional issue, critical to due process and the right to a fair trial to rule whether Petitioner in this case suffered a constitutional deprivation of his property interests. *Wansong v. Wansong*, 395 Mass. 154, 157 (1985), cert denied 474 U.S. 1014 (1985).

It is undisputed that in October of 2005, the wife sought the Petitioner's deposition in the divorce matter, when the Petitioner's criminal matter for crimes against the wife was pending Massachusetts courts have held that in these circumstances a litigant may not be subject to a discovery sanction that is a penalty upon the litigant for his assertion of his Fifth Amendment privilege against self incrimination, *Wansong v. Wansong*, 395 Mass. 154, 157 (1985) cert denied (1985) 474 U.S. 1014. While the Probate judge has broad discretion to impose discovery sanctions, the Probate judge was to balance the prejudice suffered by the wife resulting from the failed deposition, while maintaining the protections

necessary for the Petitioner's Fifth Amendment rights against self incrimination. The discovery sanction should have been tailored to meet the prejudice suffered by the wife as a result of the fact that the Petitioner would not be deposed. Plaintiff proved by clear and convincing evidence that the sanction went way beyond the limits of the prejudice suffered by the wife and barred the Petitioner from presenting third party witnesses and/or documentary evidence in support of the value of the marital assets.

In our case, the prohibition against Petitioner from offering or opposing *any* evidence on financial circumstances of marital property, or relevant 208 § 34 factors, is akin to the entry of a default judgment of divorce against the Petitioner. The policy of the Massachusetts Rules of Domestic Procedure is against the issuance of default judgments in divorce actions, even in cases where there are flagrant violations of the discovery rules. *Imprescia v. Imprescia* 392 Mass. 101, 102 (1984). A proper discovery sanction against a person who was claiming his rights against self incrimination under the Constitution of the United States is described in the case of *Wansong v. Wansong,* 395 Mass. 154, 157-158 (1985), cert denied (1985) 474 U.S. 1014. In that case, the Supreme Judicial Court stated that the judge's task is to balance any prejudice to the other civil litigants which might result, against the potential harm to the party claiming the privilege if he is compelled to choose between defending the civil action and protecting himself from criminal prosecution. *United States Trust Co. v. Herriott*, 10 Mass. App. Ct. 313, 317 (1980), citing *Arthurs v. Stern*, 560 F.2d 477, 478--480 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). The concept of 'penalty' includes "the imposition of any sanction which makes assertion of the Fifth

Amendment privilege 'costly'." *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 517 (C.A.1 1996), citing *Spevack v. Klein*, 385 U.S. 511, 514, 87 S. Ct. 625,627, 17 L.Ed.2d. 574 (1967).

The Petitioner avers that the court sanction unconstitutionally exceeded the prejudice suffered by the wife because the wife had the opportunity to depose the third party witnesses offered by the Petitioner in his defense of the divorce and because she had equal access to the documentary evidence that the Petitioner wanted to offer at the divorce trial as well. The lack of prejudice that the wife would have suffered had the Petitioner been permitted to bring in third party witness and the said documentary evidence became and impermissible penalty because the wife could demonstrate no prejudice suffered as a result of the failed deposition of the Petitioner. The Court, "in its sound discretion, *must* assess and balance the nature and substantiality of the injustices claimed on either side." (*U.S. Trust, Supra.* p. 317). Petitioner claims the court abused that discretion and failed to balance the undisputed equities in Petitioner's favor and unconstitutionally deprived him of his property without due process of law.

In this case the balancing test was not applied by Probate Court judge and the failure to apply the balancing test was totally ignored by the appellate courts of the Commonwealth of Massachusetts. The Petitioner was prevented from presenting *any* evidence of the value of his property and evidence of his rights as protected by the Delaware statutory scheme prohibiting the dissolution of his limited liability companies except in compliance with Delaware law. (A. 15) Petitioner lost the ability to contest the value

of his own LLC's and their dissolution under Delaware law and unfairly lost well over 15 million dollars, and the balancing of the harms compels this court of final resort to review the fundamental fairness, legal authority and process due assigning both Delaware LLC's to the wife in this divorce judgment. (A. 15-18)

II. The Massachusetts Appeals Court's judgment, affirmed by the Massachusetts Supreme Judicial Court, is in direct conflict with the holding of a United States Court of Appeals decision concerning an important federal constitutional right of client privacy, confidentiality and attorney disqualification due to conflicts of interest?

The Probate Court erred by failing to disqualify the Wife's attorney for a conflict of interest, where attorneys in his firm had represented Petitioner in the past on matters that were substantially related to the issues raised by the Wife's complaint for divorce. The Massachusetts Appeals Court unconstitutionally shifted the burden to Petitioner to prove that Bowditch & Dewey attorney's learned anything prejudicial from the earlier representation before they would be disqualified. *Steinert v. Steinert,* 73 Mass. App. Ct. 287, 288 (2008). Petitioner claims that the Supreme Court has jurisdiction on this important federal question concerning an attorney's duty to disqualify himself as it relates to the a client's rights to privacy and confidentiality. In the case before the court, the Massachusetts Supreme Judicial Court affirmed the Massachusetts Appeals Court in a decision that was contrary to a decision of the United States Court of Appeals. Federal law with respect to

successive legal representation and the issue of what constitutes "substantial information received" as grounds for voluntary attorney disqualification is contrary to this decision of the Massachusetts Supreme Judicial Court. *Richardson v. Hamilton Int'l. Corp*, 469 F.2d 1382, 1385 (3rd Cir. 1972) (the question is not what the law firm actually acquired from it's former client but whether the attorney might have acquired information related to the subject matter of his subsequent representation) In the case of *United States Filter Corporation, U.S. v. Ionics, Inc.*, 189 F.R.D. 26, 30 (D. Mass. 1999) the Federal Court found that disqualification was warranted because "substantial material information was received", by a former equity partner who had consulted with other attorneys in the law firm and worked on a case for the client for only 1.6 hours. The nature and extent of involvement of B&D's attorneys legal representation of the Petitioner was substantially greater over the years than the law firm in *United States Filter Corporation, U.S. v. Ionics, Inc.*, 189 F.R.D. 26, 30 (D. Mass. 1999).

Disqualification from continued representation is a prophylactic measure that courts have invoked in appropriate circumstances to prevent the improper disclosure of clients' confidences, or to ameliorate the effects of such disclosures where they have occurred. A Court must attempt to prevent confidential information that might have been gained in the first representation of prior client from being used to the detriment of the prior client in the subsequent action." *Realco Servs., Inc. v. Holt*, 479 F. Supp. 867, 871 (E.D. Pa 1979). Here the Probate Court abused it's discretion and committed prejudicial error permitting Petitioner's former attorney to represent his wife's interests with respect to the exact property,

including proprietary real estate development plans, B&D had represented him on, without required due process or rights to a fair trial, and Petitioner seeks review of this court to determine violations of Petitioner's constitutional rights to privacy, property and liberty as an law firm's prior client and to render the judgment of divorce void.

The Probate Court and Massachusetts appellate courts committed manifest prejudicial error and fundamental fairness requires vacation of the divorce decree. There have been unexplained repeated inaccurate factual findings that the wife's lawyers never represented Petitioner individually, but only represented the Petitioner's business known as Highland Associates of Worcester and that said business was incorporated in 1999. However, all undisputed and self authenticating records before the Massachusetts Courts clearly indicate that the Petitioner owned his unincorporated business individually at the time that the wife's law firm represented him in 1999. (A. 12-14) This repeated misstatement of facts by the appellate courts of Massachusetts became the subterfuge necessary to deprive the Petitioner of a fair resolution of the conflict of interest issue. Even if wife's attorney's claims that they only represented the Petitioner's corporations, the statutes of Massachusetts indicate that generally, any attorney client privilege between attorney and corporation is equivalent to an traditional attorney client privilege. M.G.L.A. c.156A s.6(c), (see also, Mass. R. Prof. R. Rule 1.6(b)(1), and Rule 1.6 (b)(3)).

Contrary to the decision of the Probate Court, the attorney's representation of the wife against the Petitioner in this divorce action, was materially adverse to plaintiff. "A lawyer who has formerly

represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." (see, Mass. R. Prof. C. Rule 1.9(a)). Prohibition of successive representation arises from "the attorney's duty . . . to preserve his client's confidences and secrets". *Bays v. Theran*, 418 Mass. 685, 691 (1994). That duty survives the termination of the attorney-client relationship. *Bays v. Theran*, 418 Mass. 685, 692 (1994). Under the 'substantial relationship' test, a subsequent representation is proscribed 'on the sole ground that the later suit, simply because of its substantial relation to the former one, exposes the attorney to an intolerably strong temptation to breach his duty of confidentiality to the former client. The [former] client need never prove that the attorney *actually* misused the confidences to the client's disadvantage. Instead he must prove only the existence of the tempting *situation* by showing (1) that an attorney-client relationship existed in the former legal representation, and (2) that the former and current representations are both adverse and substantially related. Thus, the 'substantial relationship' test operates by assuming that confidences were transmitted in the former attorney-client relationship. Even after termination of the attorney-client relationship, a lawyer remains bound by the Code [of Professional Responsibility to preserve these confidences." (Citations omitted, quoting from Note, Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1315 (1981)). Petitioner contends the Probate Court's denial of motion to disqualify counsel deprived Petitioner from his prior attorney-client

confidences and a fair trial. Petitioner claims wife's divorce counsel received many confidences germane to the probate court litigation during his earlier representation of petitioner and improperly used and disclosed that information against his former client's best interests. The probate Courts denial of Petitioner's motion to disqualify in fact denied him a right to a fair trial.

III. Whether the Massachusetts Probate Court's allowance of a post trial motion amending the Divorce Judgment to eliminate a ten million dollar contractual compensation right of the Petitioner 53 days after the Divorce Judgment, in direct violation of the 10 day time limits established by Mass. R. Dom. P. Rules 4(e) and 59(b), constitutes prejudicial error, manifest injustice and the denial of Petitioner's constitutionally protected property rights without due process and his rights under the Full Faith and Credit Clause, Article IV Section 1, of the United States Constitution?

The Probate Court's allowance of the wife's motion under Rule 60(b)(1), to amend the divorce judgment, constitutes manifest injustice and prejudicial error in that it was filed 43 days after the time allowed for a post judgment motion to amend the judgment. (A. 5) (see, Mass. R. Dom. P. Rules 4 (e) and 59(b). Moreover, Mass. R. Dom. P. Rule 60(b)(1) was an improper vehicle for the *amendment* of a divorce judgment, rather than the *vacation* of a divorce judgment. The Probate Court allowed this vehicle to be improperly used to nullify the petitioner's corporate contractual rights under his Operating Agreement with Delaware

LLC's in accordance with the laws of Delaware, and in doing so denied Petitioner constitutionally protected property interests, due process rights, rights under the Full faith and Credit Clause, and rights against compelled self incrimination.

The Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court's affirmation of the Probate Court's 43 day late amendment to the divorce judgment, effectively forfeited the Petitioner's right to $10 million dollars under an unambiguous corporate contractual compensation provision, contrary to Delaware law and without due process of law or any actual and fair litigation of the issues.(A. 5-7, 14-18) Petitioner was deprived his constitutionally protected rights to statutory dissolution under Delaware law, because the divorce judgment was erroneously amended and not vacated under Rule 60(B)(1), and constitutes an unconstitutional taking of Petitioner's property and prejudicial and reversible error. (see, 6 Del. C. s.18-703(a)(d)(f)) Relief from judgment may not be had under subdivision (b) of Mass. R. Dom. P. 60, when the amendment of the judgments involve property rights, particularly those pertaining to real estate titles, and the fact that a court may have made a mistake in the law when entering judgment, or their may have been a judicial change in the court's view of the law after it's entry, does not justify setting it aside. *Collins v. Wichita*, 254 F.2d 837 (1958). The provisions of Mass. R. Dom. Rel. Rule 60(b)(1) did not authorize a court to entertain a motion for amendment of the judgment not served within the ten day period following the judgment of divorce.

The Massachusetts Supreme Judicial Court affirmed the Massachusetts Appeals Court holding that

petitioner had waived his right to appeal the property distribution under M.G.L.A. c.208 s.34, because he had failed to object to the Master's report under Mass. R. Dom. P. Rule 53(h)(2). (A. 5) Petitioner avers he did in fact object to the master's report on more than one occasion and waiver of appellate issues constitutes prejudicial error and manifest injustice, (A. 28-31) Due process, Full Faith and Credit rights and constitutional rights to a fair trial and fundamental fairness compels a vacation of the divorce decree with respect to petitioner's property rights in the two separate Delaware LLC's, awarded to his wife in the divorce judgment. (A. 14-19)

Moreover, Petitioner claims the Probate Court acted outside it's statutory authority and in direct conflict with Delaware law when it issued the Divorce Judgment assigning the Delaware, LLC's to wife, (see, M.G.L.A. c.215 s.2, s.4). The Massachusetts Probate Courts have only the jurisdiction conferred upon them by statute. *Thyself v. Harvard Trust Co.* 154 F.2d 732, 734 (CA 1 1946). Delaware corporate law provides an *exclusive* remedy of any individual making a claim against the member of a limited liability company. Controlling Delaware law mandates any debtor to obtain a charging order against Petitioner's membership interest in the Delaware LLC's, 6 Del. C. s.18-703(a)(d)(f)). Therefore the divorce judgment assigning these Delaware LLC's to Helen Lariviere is beyond the authority of the court and is void.

Under the Full Faith and Credit Clause, states must avoid infringement upon other states sovereignty and in weighing the governmental interests of each jurisdiction, petitioner's claim that controlling Delaware corporate law with respect to the fair sta-

tutory dissolution of these Delaware LLC's should prevail. *Franchise Tax Board of Cal. V. Hyatt*, 538 U.S. 488, 498 (2003). Article IV section 1 of the United States Constitution states that "Full Faith and Credit shall be given to each state to the public Acts, Records, and judicial proceedings of every other state". It is undisputed that Petitioner established valid Delaware LLC's named Highland Associates of Worcester, LLC No. 1 and Highland Associates of Worcester, LLC No. 2, in 2001.(A. 11-13) An operating agreement was duly executed and has served as the corporate governance document for the business entities. The LLC's paid Delaware taxes and are duly registered and active as per the Delaware Secretary of Corporations public record. (A. 34-35) Petitioner was not given a full and fair opportunity to litigate his property rights or permit the proper disposition of his property under Delaware's providing exclusive statutory protections for issues such as the 10 million dollar contractual employment compensation (golden Parachute) clause in the Delaware LLC's operating agreement, in probate court. In this regard he was denied a fair trial, equal protection under the laws and due process with respect to these property rights when his two Delaware LLC's were assigned away by the Probate Court contrary to plaintiff's constitutional rights and Delaware law. (see, *Zinerman v. Burch,* 494 U.S. 113, 124 (1990)).

Petitioner had a property right in his soley owned LLC's which is protected by the constitution. *Fuentes v. Shevin,* 407 U.S. 67, 86-87 (1972). The process that was due petitioner was the applicable and required Delaware statutory dissolution process where petitioner would have the fair opportunity to itemize, assess and argue asset values held by the LLC's including the enforceability of his ten (10) million

dollar executive compensation clause upon termination, for whatever reason. (see, *Fuentes v. Shevin,* 407 U.S. 67, 86-87 (1972) Petitioner argues that meaningful access to judicial protection under Delaware Law outlines the constitutional due process rights that were denied petitioner by the probate court divorce judgment and the interests of justice warrant that the judgment be vacated.

The LLC's that were assigned in the divorce decree were incorporated in Delaware. Although the probate court has broad discretion to provide a rational basis for proportionate allocation of marital real estate that discretion does not include circumventing Delaware Corporation Law in the required proper dissolution of a business entity as an exclusive remedy; see also, *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 371 (1985). The United States Supreme Court and the Massachusetts Supreme Judicial Court have both held that the exercise of jurisdiction to grant a divorce is based upon domicile. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). The source of the probate court's authority to assign property pursuant to a complaint for divorce is G. L. 208 § 34, *Johnson v. Johnson,* 425 Mass. 693, 695 (1997). The court denied petitioner's clearly established constitutional due process and Full Faith and Credit rights by failing to consider all of the mandatory factors required by G.L. 208 § 34, and by failing to fix the nature and value of the Delaware domiciled Limited Liability Companies.(A. 14) The only evidence of values of the properties held by the LLC's were tax assessed values which were grossly disproportionate to actual values.(A. 2) Petitioner presented clear and convincing evidence to the Appeals Court that the Probate Court judge placed arbitrary and capricious values to the marital properties in violation of the

due process clause of the Fourteenth Amendment, the requirements contained in MGLA c.208 § 34, and Delaware law. Massachusetts Courts have held that it is a "questionable practice" for the Court to assign a closely held corporation to a party in a divorce, without first assigning a value to that corporation, *Grubert v. Grubert,* 20. Mass. App. 811, 815 n.7 (1985). The Court's assignment of the companies was fatally flawed when the value of that asset is left to impermissible speculation, *Caldwell v. Caldwell*, 17 Mass. App. Ct. 1032, 1033-1034(1984). In this case the assignment of the Delaware limited liability companies to the Wife, without any findings concerning the proper dissolution under Delaware law as well as the nature and value of the limited liability companies, constitutes a clearly erroneous abuse of discretion, *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 15 (1977). (A. 16-17)

CONCLUSION

For the foregoing reasons supported by Appendix evidence. Petitioner asks this court to grant his Petition for Writ of Certiorari to decide the important constitutional questions presented and prevent manifest injustice.

Respectfully submitted,

WILLIAM W. COTTING, ESQ.
Counsel of Record
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Shrewsbury, MA 01545
(508) 845 6060
wcotting@Cotting.com

Counsel for Petitioner

May 27, 2010

APPENDIX

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APPENDIX A

Supreme Judicial Court for the
Commonwealth of Massachussetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020. Fax 617-667-1145

Carey H. Smith, Esquire
Morrison Mahoney LLP
446 Main Street
Worcester, MA 01608

[Illegible]
Feb 8 2010

RE: Docket No. FAR-18390

HELEN LARIVIERE
vs.
RICHARD LARIVIERE

Worcester Probate & Fam No. 03D0542DV1 & Cross Reference G3R0103A61-0SE00930C1.

A.C. No. 2008-P-1328

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on _____, the above-captioned Application for Purther Appellate Review was denied.

Susan Mellen, Clerk

Dated: January 27, 2010

To: Michael P. Angelini, Esquire
Carey H. Smith, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square. Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

November 27, 2009

Wayne P. Tupper, Esquire
Wayne P. Tupper, P.C.
27 West Mountain Street
Worcester, MA 01606

RE: No. 2008-P-1326
Lower Ct. No.: 03D0542DV1 &

HELEN LARIVIERE
vs.
RICHARD LARIVIERE

NOTICE OF DOCKET ENTRY

Please take note that on November 27, 2009, the following entry was made on the docket of the above-referenced case:

Decision: Rule 1:28 Judgment as amended on January 25, 2007, and on May 21, 2008, affirmed (BY GG WO). Notice. (See image on file.)

Very truly yours,

The Clerk's Office

Dated: November 27, 2009

To: Michael P. Angelini, Esquire
Wayne P. Tupper, Esquire
Richard W. Jensen, Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston,

In the case no. 08-P-1328

HELEN LARIVIERE

vs.

RICHARD J. LARIVIERE.

Pending in the Probate & Family

Court for the County of Worcester

Ordered, that the following entry be made in the docket:

Judgment, as amended on January 25, 2007, and on May 21, 2008, affirmed.

By the Court,

[Illegible], Clerk

Date November 27, 2009

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

08-P-1328

HELEN LARIVIERE

vs.

RICHARD J. LARIVIERE.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

In this appeal from a judgment of divorce nisi, the defendant husband claims that the probate judge abused her discretion in (i) denying his motion for a new trial, (ii) allowing the wife's motion for relief from judgment, (iii) imposing excessive discovery sanctions, (iv) denying the husband's repeated motions to recuse the judge, and (v) denying the husband's motion to disqualify opposing counsel. We consider the husband's several arguments in turn, referring to facts established in the record as they become relevant.

Motion for new trial. The husband asserts error in the probate judge's denial of his motion for a new trial. In determining whether the lower court erred in denying a motion for a new trial, we review the findings to determine whether the judge abused her discretion or committed a clear error of law. *Kaltsas v. Duralite Co.*, 4 Mass. App. Ct. 634, 639 (1976). Such decisions will not be reversed on appeal absent

a showing, by clear and convincing evidence, that the decision constituted an arbitrary determination, capricious disposition, or whimsical thinking that no conscientious judge could have reached. *Care & Protection of Georgette*, 54 Mass. App. Ct. 778, 787 (2002).

The husband's contentions are twofold. We first address the claim that the judge improperly valued the property in the marital estate by accepting "assessed" values in lieu of fair market value for most properties. Though we acknowledge that fair market value and assessed value may not always comport with one another, it is well settled that assessors have a statutory and constitutional "obligation to assess all real property at full and fair cash value." *WB&T Mort. Co. v. Assessors of Boston*, 451 Mass. 716, 726 (2008). The standard used to determine cash value is fair market value, namely the price an owner willing but not under compulsion to sell ought to receive from one willing but not under compulsion to buy. *General Elec. Co. v. Assessors of Lynn*, 393 Mass. 591, 608 (1984).

While such assessments are not infallible, the market value of real estate generally "[can] not be proved with mathematical certainty." *Ibid.* The valuations in this case were based on real estate tax bills for all relevant properties that included "assessed" values.[1] The record bears no indication that the assessors of these properties failed to meet their statutory obligation of calculating the properties' fair market values. Given the judge's broad discretion,

[1] Contrary to the husband's argument, the record clearly states that the bills relied on by the judge were for the fiscal year 2007.

we cannot say that the acceptance of these valuations constituted clear error.

The husband further contends that the probate judge erred in failing to consider all the mandatory factors set forth in G. L. C. 208, § 34. The asserted error hinges on the husband's contention that the probate judge merely "adopted" the master's findings. We agree with the husband's contention that the weight to be given to each of the § 34 factors is the province of the probate judge. *Robbins v. Robbins*, 16 Mass. App. Ct. 576, 579 (1983). Notwithstanding, the uncontested record reveals that the judge entered her own findings of fact and came to a reasoned conclusion, taking into consideration all mandatory § 34 factors. What weight a judge chooses to give to each of the factors is a matter of discretion. *Cabot v. Cabot*, 18 Mass. App. Ct. 903, 905 (1984). We ascertain no error in the judge's findings.[2]

Rule 60(b) motion. The husband appeals the probate judge's allowance of the wife's motion for relief from judgment, alleging that the wife failed to demonstrate inadvertence or excusable neglect. Mass.R.Dom.Rel.P. 60(b). The judge obliged the wife's request to alter the judgment of divorce, effectively

---

[2] The husband's third claim on this point, that the probate judge erred in failing to assign independent value to the husband's real estate companies, is not properly before us. Rule 53(h)(2) governs the proper procedure for objecting to a master's findings. Mass.R.Dom.Rel.P. 53(h)(2). The husband failed to raise objections to the lack of any independent valuation of the business entities. Thus, any right to appellate review was waived. *See Raw-Tek Servs., Inc. v. Parker*, 84 Mass. App. Ct. 165, 173 (2005). Additionally, the record contains no rational basis on which to distinguish the value of the companies, which existed purely for the purpose of holding title, from the value of the underlying assets.

denying the husband's claims to $10,000,000 stemming from his termination as manager of his businesses, Highland Associates of Worcester Nos. 1 & 2.[3] A judge's allowance of such a motion is entitled to marked deference, and we reverse such a ruling only on a clear showing of an abuse of discretion. *See Tai v. Boston*, 45 Mass. App. Ct. 220, 224 (1998). Upon review of the record, we conclude that the probate judge did not abuse her discretion.

Rule 60(b)(1) permits a court to relieve a party of a final judgment for mistake, inadvertence, surprise, or excusable neglect. The rule provides a procedure for removing the burdens of a judgment where the interests of justice and fairness require relief. *Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 429 (1979). We have held that the rule is "remedial in character and subject to a liberal interpretation and application in a situation where the mischief leading to the judgment occurs at the pretrial stage," as was the case here. *Adoption of Eugene*, 415 Mass. 431, 437 (1993).

The probate judge credited the wife's contention that the relevant provision of the operating agreement was not specifically brought to the judge's attention or, alternatively, was not noticed or taken

---

[3] The husband sought damages in Federal court pursuant to the companies' amended operating agreement, the relevant section of which reads: "In the event the [m]anager . . . is terminated for any reason . . . the [m]anner shall be entitled to an immediate lump sum payment of [f]ive million (d)ollars." The probate judge amended the judgment of divorce, permitting the wife to take ownership of the companies "free and clear of all debts, claims and liabilities, including claims [which] may arise by reason of (the husband's] termination as [m]anager of such [b]usiness [e]ntities."

seriously by the wife's counsel. The judge did not credit the husband's contention that he provided the operating agreement during discovery, given his history of obstructive behavior.[4] The judge was acting well within her authority in concluding that denying the wife's motion would essentially result in a windfall to the husband, defeating the judge's prior equitable division of assets.

Rule 37(b) sanctions. After repeated warnings, the probate judge imposed sanctions on the husband for failing to comply with discovery requests.[5] Mass.R.Dom.Rel.P. 37(b). The husband claims the judge abused her discretion and imposed excessive sanctions in response to his valid assertion of the Fifth Amendment privilege.[6] The husband's claim holds no merit.

We readily acknowledge that a litigant may not be subjected to a penalty such as the imposition of any sanction which makes assertion of the Fifth Amendment privilege costly. *Wansong v. Wansong*, 395 Mass. 154, 157 (1985) (quotations omitted). However, "not every undesirable consequence which may follow

---

[4] The husband claims that the wife should have been aware of the operating agreement because her counsel and her accountant were given access to files "containing" the agreement during discovery. Alternatively, he points to his financial statement which lists "deferred compensation" as an asset stemming from the agreement. However, the financial statement valued this asset at zero dollars.

[5] The husband was "prohibited from presenting or opposing any evidence on financial circumstances or relevant [G. L. c. 208, § 34) factors necessary for the (judge] to make a fair determination in this case."

[6] The husband's assertion of the privilege emanated from criminal charges against him for conspiracy to commit murder.

from the exercise of the privilege against self-incrimination can be characterized as a penalty." *Ibid.* We have previously held that, in evaluating a claim of privilege, a judge must balance any resulting prejudice to other litigants against the potential harm to the party claiming the privilege. *United States Trust Co. of N.Y. v. Herriott*, 10 Mass. App. Ct. 313, 117 (1980). When imposing sanctions, a judge enjoys broad discretion. *Morgan v. Jozus*, 67 Mass. App. Ct. 17, 24 (2006).

Here, the husband's assertion of the privilege went well beyond matters concerning his pending criminal charges. Rather, the husband's conduct amounted to a veritable blockade against any further efforts at discovery. The husband claimed the privilege with respect to every question relevant to the G. L. c. 208, § 34, standards. Where a party fails to obey an order to provide discovery, Mass.R.Dom.Rel.P. 37(b)(2)(B) permits the court to enter an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or *prohibiting him from introducing designated matters in evidence*" (emphasis supplied). After balancing the competing interests, the judge imposed sanctions explicitly provided for in Massa.R.Dom.Rel.P. 37(b)(2), an order clearly within her discretion.

Motion to recuse. The husband asserts error in the probate judge's denial of his several motions for recusal. The matter of recusal is generally left to the discretion of the trial judge and an abuse of discretion must be shown to reverse a decision. *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991). The motion judge conducted an evidentiary hearing before issuing her decision. Her decision is supported by the record, and we accordingly affirm her denial of the

motions. Given the sparse nature of the husband's allegations, we find no basis for concluding that the probate judge abused her discretion.[7] *See Herridge v. Board of Registration in Med.*, 420 Mass. 154, 158 (1995) (acquaintance with witness which ended five years prior to commencement of hearing created no appearance of impropriety).

Motion to disqualify counsel. The husband's final contention asserts error in the probate judge's denial of his motion to disqualify opposing counsel. The husband alleges that counsel's law firm represented him personally in a prior lawsuit. We discern no error in the judge's findings below, and

* * *

[7] The entirety of the husband's allegations can be summed up as follows: (1) twenty-two years before trial, in or about 1985, the probate judge worked in the same law office as Attorney Robert Weihrauch and that "it was well publicized . . . that the criminal case against (the husband) involved the Weihrauches," and (2) that in September of 1998, the probate judge had presided over the wedding of the wife's attorney, Michael P. Angelini.

The Commonwealth of Massachusetts
William Francis Galvin

Secretary of the Commonwealth, Corporations Division
One Ashburton Place, 17th floor
Boston, MA 02108-1512
Telephone: (617) 727-9640

HIGHLAND ASSOCIATES OF WORCESTER NO. 1, LLC Summary Screen

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The exact name of the Foreign Limited Liability Company (LLC): HIGHLAND ASSOCIATES OF WORCESTER NO. 1, LLC

Entity Type: Foreign Limited Liability Company (LLC)

Identification Number: 043573183

Date of Registration in Massachusetts: 09/14/2001

The is organized under the laws of: State: DE Country: USA on: 08/30/2001

The location of its principal office:
No. and Street: 5 SUBURBAN RD., SUITE 103
City or Town: WORCESTER State: MA Zip: 01602 Country: USA

The location of its Massachusetts office, if any:
No. and Street: 5 SUBURBAN RD., SUITE 103
City or Town: WORCESTER State: MA Zip: 01602 Country: USA

The name and address of the Resident Agent:
Name: HELEN LARIVIERE
No. and Street: 5 SUBURBAN ROAD
SUITE 103
City or Town: WORCESTER State: MA Zip: 01602 Country: USA

The name and business address of each manager:

Title	Individual Name First, Middle, Last, Suffix	Address (no PO Box) Address, City or Town, State, Zip Code
MANAGER	HELEN LARIVIERE	5 BROOKSHIRE RD WORCESTER, MA 01609 USA

The name and business address of the person in addition to the manager, who is authorized to execute documents to be filed with the Corporations Division:

Title	Individual Name First, Middle, Last, Suffix	Address (no PO Box) Address, City or Town, State, Zip Code

The name and business address of the person(s) authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property:

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File Number:	3430161	Incorporation Date / Formation Date:	08/23/2001 (mm/dd/yyyy)
Entity Name:	HIGHLAND ASSOCIATES OF WORCESTER NO. 1, LLC		
Entity Kind:	LIMITED LIABILITY COMPANY (LLC)	Entity Type:	GENERAL
Residency:	DOMESTIC	State:	DE

REGISTERED AGENT INFORMATION

Name:	HARVARD BUSINESS SERVICES, INC.		
Address:	16192 COASTAL HIGHWAY		
City:	LEWES	County:	SUSSEX
State:	DE	Postal Code:	19958
Phone:	(302)645-7400		

Additional information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

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Entity Details

THIS IS NOT A STATEMENT OF GOOD STANDING

File Number:	3430182	Incorporation Date / Formation Date:	08/23/2001 (mm/dd/yyyy)
Entity Name:	HIGHLAND ASSOCIATES OF WORCESTER NO. 2, LLC		
Entity Kind:	LIMITED LIABILITY COMPANY (LLC)	Entity Type:	GENERAL
Residency:	DOMESTIC	State:	DE

REGISTERED AGENT INFORMATION

Name:	HARVARD BUSINESS SERVICES, INC.		
Address:	16192 COASTAL HIGHWAY		
City:	LEWES	County:	SUSSEX
State:	DE	Postal Code:	19958
Phone:	(302)645-7400		

Additional information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

Would you like Status Status,Tax & History Information Submit

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APPENDIX F

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department
Worcester Division

Docket No. 03D0524-DV1

HELEN LARIVIERE,
Plaintiff

vs.

RICHARD J. LARIVIERE,
Defendant

ORDER
(On Plaintiffs Motion for Relief from Judgment pursuant to Rule 60, filed February 26, 2008)

This matter came before the Court (Ricci, J.) on April 28, 2008 on the Plaintiff, Helen Lariviere's ("Wife") Motion for Relief. For the following reasons, the Motion is ALLOWED. A new Judgment shall enter this date.

The parties were divorced on November 20, 2007. Pursuant to the Judgment of Divorce, the Defendant, Richard Lariviere ("Husband") was ordered to transfer ownership of two (2) business entities to the Wife (Paragraph 2) and the Husband was ordered not to "act in any manner, with respect to the businesses or property held by them . . . without the advance written approval of the Wife." (Paragraph 3). As

explained in the Court's Findings and Rationale entered that date, the Court intended a 60%/40% division of marital assets in favor of the Wife.

On February 26, 2008, the Wife filed the instant Motion for Relief from the Court's Judgment pursuant to Rule 60(b)(1). In support of her motion, the Wife states that the Husband filed an action in Federal Court against the Business Entities alleging that he is owed the sum of $5 million from each company due to his alleged termination as manager of the businesses[1] Attached to the Wife's Motion as Exhibit B is a copy of the Federal Complaint quoting language from the first amendment to the operating agreement of the business entities which appoints Husband as Manager, fixes his compensation, and states that "*in the event the Manager . . . is terminated for any reason, then in addition to any payment s which have been made up to that point, the Manager shall be entitled to an immediate lump sum payment of Five Million ($5,000,000.00) Dollars, such amount 'representing the liquidated damages of the value of the Manager's special allocation provided for in paragraph 11(a) above, for past services rendered to the business.*" (Exhibit 1). The parties' divorce case Was tried before a Master and no evidence was introduced with respect to this liability and was therefore not considered or accounted for in the Court's Judgment. The Wife requests that the Court amend its Judgment to indemnify the Wife against this potential ten million dollar liability. On April 28, 2008, the Court held a hearing on the Wife's Motion at which counsel for both parties were present and one exhibit was introduced into evidence.

---

[1] This case was recently dismissed for lack of jurisdiction.

Rule 60(b)(1) provides that. the Court may relieve a party of a final Judgment for mistake, Inadvertence, surprise, or excusable neglect. In evaluating this type of motion, the Court should consider, among other relevant circumstances, the knowing:

> "(1) whether the offending party has acted promptly after the entry of the judgment . . . (2) whether there is a showing . . . that the claim sought to be revived has merit; (3) whether the neglectful conduct occurs before trial, as opposed to during, or after trial: (4) whether the neglect was the product of a consciously chosen course of conduct on the part of 'counsel; (5) Whether prejudice has resulted' to the other party; and (6) whether the error is, chargeable to the party's legal representative . . ." *Berube v. Mckesson Wine & Spirits Co.*, 7 Mass.App.Ct, 426, 430 (1979).

Rule 60(b)(1) "provides a procedure for removing the burdens of a judgment where the interests of justice and fairness require relief. . . . and is "remedial in character and subject to a liberal interpretation and application in a situation where the mischief leading to the judgment occurs at the pretrial stage." *Berube v. McKesson Wine & Spirits Mass*, App.Ct. 426, 429 (1979).

Here, I find that all of the above factors are met and that justice requires that a new judgment enter. The Wife's motion was timely filed as soon as she learned of the potential liability to the company and alleges that she did not know or take seriously the amendments to the operating agreement which constitute the basis for the ten million dollar liability. The Husband in his opposition, states that he provided the amendments to counsel for the Wife.

The Husband also provided an affidavit from Richard Bernard, the controller of the business entities, in which he states that he gave full access to the filing' cabinets at the business offices and that he gave copies of the operating agreement in January. 2008 to a gentleman purporting to be an agent of the Wife, During the pendency of the divorce proceeding, this Court entered an order pursuant to *Wansong v. Wansong*, 395 Mass. 154 (1985) precluding the Husband from introducing or Opposing any evidence with respect to financial matters in this case. This order was in response to repeated obstruction with discovery perpetrated by the Husband. At the hearing on the instant motion, the Husband presented no other credible evidence that he had provided this important information to the Wife during the normal course of discovery and I do not credit that he provided this discovery to the Wife given the history of obstructive behavior on his part. While it is true that the Husband could not himself introduce this evidence at the divorce hearing, he had an obligation to produce it and bring it to the attention of the Wife.[2]

I further find that justice and fairness require that the Wife be granted relief. If the Husband prevails with his civil complaint requesting $10 million from the businesses awarded to the Wife pursuant to this Court' Divorce Judgment, the result will not be the 60/40 division of assets contemplated by the Court. If

[2] The Court also notes that in his findings, the Master noted that employees ran the businesses (Finding No. 30), not the Husband and at no time has the Husband even represented himself to the Court or on financial statement or on other documents filed with the Court that he was the "Manager" of the businesses.

successful, the Wife's assets could potentially be reduced from $11,000,000 to less than $1,000,000. This would not only be contrary to the Rationale and contemplation of the Court but would be inequitable and unjust. Accordingly, I find it equitable, in order to secure the assets rightfully awarded to the Wife, that a new Judgment issue indemnifying her from this potential liability. While it is correct that a Rule 60(b) motion only allows this Court to grant relief from the judgment, the Court held a hearing at which neither party denied the existence or implication of the amendments to the operating agreements of the businesses which is the only relevant fact necessary for the Court to make a determination, For all the foregoing reasons, it is hereby ORDERED as follows:

1 The Corrected Amended Judgment of Divorce Nisi dated January 3, 2008 is 'hereby vacated.

2. A Judgment of Divorce *Nisi* shall enter this date, nunc pro tunc to the date of the original Judgment, striking Paragraphs 2 and 4 and replacing them with the following:

Paragraph 2: The Husband shall transfer ownership of Highland Associates of Worcester No. 1, LLC and Highland Associates of Worcester No. 2, LLC (the Business Entities") to the Wife within fifteen (15) days, free and clear of all debts, claims and liabilities, including claims with may arise by reason of his termination as Manager of such Business Entities, except for the existing mortgage liability to Bay state Savings Bank and except for current obligations to tenants and except that the Husband may transfer from said Business Entities to himself or his designee, the follow-

ing described parcels of real estate, which the Husband shall be entitled to as sol owner:

a. 25 West. Street;
b. 190 Institute Road;
c. 27-29 West Street;
d. 15 Irving Street;
e. 61 Townsend Street;
f. 7 Woodbine Street ;
g. 96-98 Canterbury Street;
h. 17-17 1/2 Cheever Street;
i. 23 & 25 Oread Place.

Paragraph 3: "The Husband shall immediately transfer to the Wife all books, financial statements, ledgers, banking information, equipment and other documents and property belonging to or related to the "Business Entities" and held by them as of the date the Master issued his findings (June 21, 2007). The Wife shall forthwith be entitled to complete access and control of the Business Entities pending their transfer."

Date: May 21, 2008

/s/ Susan D. Ricci,
Susan D. Ricci, Justice
Worcester Probate and Family Court

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS.

Civil Action No. 06-0296-A

RICHARD LARIVIERE, Individually and in his capacity as a MEMBER OF HIGHLAND ASSOCIATES OF WORCESTER, NO. 1 and HIGHLAND ASSOCIATES OF WORCESTER, NO. 2,

Plaintiffs

v.

ROBERT LONGDEN, JR., BOWDITCH & DEWEY, LLP, and MICHAEL P. ANGELINI,

Defendants

AFFIDAVIT OF MICHAEL P. ANGELINI

I, Michael P. Angelini, on oath depose and state as follows:

1. I am an attorney in good standing in the Commonwealth of Massachusetts and have been a member of the Massachusetts bar for 38 years.

2. I am a partner in and the Chairman of Bowditch & Dewey, LLP ("Bowditch & Dewey").

3. I am representing Helen Lariviere ("Mrs. Lariviere") in a divorce action pending in the Worcester Probate and Family Court, docket number 03D-0524-DV I (the "Divorce"). As the docket number indicates, that action was first filed in 2003, Mrs, Lariviere,

who is the Plaintiff in that action, was originally represented by Attorney Charles Bowser of Boston, Massachusetts. In the early; part of 2005, Mr. Bowser and Mrs. Lariviere contacted Bowditch & Dewey, asking that we also represent Mrs. Lariviere, and I first filed an Appearance on her behalf on May 2, 2005.

4. On November 19, 2005, after several months of very active litigation and after Mr. Lariviere's arrest for hiring an individual to murder Mrs. Lariviere and to burn her house and that of another Worcester lawyer and his wife, Mr. Lariviere's Counsel filed a Motion to disqualify our firm from representing Mrs. Lariviere. A true and accurate copy of that Motion is attached hereto as *Exhibit A*. Responsive Affidavits were filed by me and by my partner, Robert Longden, Jr. True and accurate copies of those Affidavits are attached hereto as *Exhibits B* and *C*, respectively. As my Affidavit indicated, as of that date we had "represented Mrs. Lariviere for more than six months prior to the filing of the Motion to Disqualify. This has included representing her at depositions, at various court hearings, including evidentiary hearings involving the cross-examination of Mr. Lariviere. Until the very filing of the Motion to Disqualify in late November 2005, there [had] been no mention whatsoever, much less any complaint regarding, any alleged conflict of interest."

5. Mr. Lariviere claimed that our firm should be disqualified by reason of our having performed work in matters involving an apartment house known as the "Highland House," which is part of the marital estate of Mr. and Mrs. Lariviere. To Mr. Longden's knowledge, as stated in his Affidavit, the firm's client was Highland Associates of Worcester, Inc., and not

Mr. Lariviere. This is also evidenced by Bowditch & Dewey's bills which were addressed to "Highland Associates of Worcester, Inc.," the fact that the bills were paid with checks from Highland House.

6. The practice at Bowditch & Dewey in the spring of 2005 was that upon the opening of a new client account, a check would be made by administrative personnel regarding the firm's representation of adverse parties. This was done in late April 2005, with respect to taking on the representation of Mrs. Lariviere. We did not represent any adverse parties. Our practice also was to make a disclosure of all new clients to all lawyers in the firm and as a result of that disclosure we learned, as referenced in paragraph number 3 of Affidavit attached as *Exhibit B*, that in 1991 the firm had 'represented two sisters of Mr. Lariviere in an adversary matter *against* Mr. Lariviere.

7. My understanding is that our conflict checks are typically limited to the prior ten years. Mr. Lariviere has raised the issue of some *limited service* provided to him by Attorney Jonathan Finkelstein and paralegal June Cote in 1991. Mr. Finkelstein left the firm in 1992 and Ms. Cote in 1994. I was not aware of either this or of any work for Mr. Lariviere when the disqualification issue was raised by Mr. Lariviere in November of 2005 and, of course, these prior services were not identified by either Mr. Lariviere or his lawyer.

8. The Probate Court (Ricci, J.) denied the Motion to Disqualify on December 2005 and on December 27, 2005 issued extensive Findings of Fact, true and accurate copies of which are attached hereto as *Exhibits D* and *E*, respectively. As the Court noted, from the time of my appearance on May 2, 2005 until the

filing of the Motion for Disqualification, I had either filed pleadings or appeared on behalf of Mrs. Lariviere more than twenty-five times and during this period, Mr. Lariviere never objected to my appearance or suggested any basis for disqualification and never claimed that he had ever personally retained Bowditch & Dewey.

9. The Court concluded that Bowditch & Dewey represented Highland Associates of Worcester and not Mr. Lariviere, that Highland Associates of Worcester consisted of a ninety-six unit apartment building in Worcester and that "the husband has not provided any basis that his alleged plans regarding the development of this marital asset in 1999 has any bearing on either its current value or its future development value" and that the property's "only relevance to these divorce proceedings is its current value." The Court further found that neither I nor Bowditch & Dewey possessed any information or documents adverse to the husband or relevant to the pending divorce proceedings.

10. Mr. Lariviere appealed Judge Ricci's decision. The appeal was filed with the Appeals Court on January 16, 2006 and denied by the Court (Trainor, J.) on January 20, 2006. A true and accurate copy of the Notice of Docket Entry dated January 20, 2006, denying the Petition is attached hereto as *Exhibit F*.

11. Shortly thereafter, Mr. Lariviere filed this action against Mr. Longden and Bowditch & Dewey in the Superior Court on February 13, 2006. I was recently added as a Defendant.

12. On May 26, 2006, Mr. Lariviere's counsel filed an Ex Parte Motion for Temporary Restraining Order, seeking to have the Court issue a temporary

restraining order ". . . prohibiting any and all members, servants, agents, employees and/or other affiliates of the defendant law firm, Bowditch & Dewey, LLP, from the representation of any persons, or third parties, with any adverse interest or claims to the property of the Plaintiff, until further Order of this Court." After hearing, the Court (Henry, J.) denied what in effect was a further effort to disqualify our firm from representing Mrs. Lariviere. A true and accurate copy of the Motion, with Judge Henry's endorsement denying the Motion, is attached hereto Exhibk,Q.

13. In early May 2006, Mr. Lariviere's son-in-law and his daughter, Lisa Siegel, filed an application for Guardianship on behalf of Mr. Lariviere. In connection with that, a further Motion to Disqualify was filed in the Probate Court. The Court held a hearing on this matter on May 11, 2006. A true and accurate copy of the Motion to Disqualify is attached hereto as *Exhibit II*. A true and accurate copy of the Opposition Is attached hereto as *Exhibit I*. In this Motion (now twelve months after we began representing Mrs. Lariviere), Mr. Lariviere claimed that two attorneys at Bowditch & Dewey had represented him in a matter involving his health in 1999. In fact, as set forth in Attorney Balko's Affidavit and as determined by the Court in its denial of this Motion (see Judge Ricci's endorsement on *Exhibit II*), Mr. Lariviere approached Attorney Balko about representing him in a claim against an insurance company based on alleged disability. He came to Bowditch & Dewey to interview Mr. Balko and also met with Jonathan Sigel, an associate at the time. Mr. Lariviere was told that the firm would consider representing him on a limited basis subject to his forwarding a retainer for $2,000 (which he did *not* do), to his paying for the

interview (which he did *not* do), and to his sending information in support of his claim so that the firm could complete its evaluation (which he did *not* do). He also did not accept the firm's engagement letter. He was sent a bill for the time of the interview which he refused to pay and in sending back the bill he wrote, "It was my understanding that we met for an initial consultation and you informed me that there was nothing you could do for me."

14. Thereafter, in a further filing titled as "Defendant's Motion For (sic) To Recuse Trial Justice," Mr. Lariviere asserted a social relationship between me and Judge Ricci, noting that Judge Ricci had served as the officiant at my and my wife's wedding in 1998. A true and accurate copy of the Motion is attached hereto as *Exhibit J*. At the hearing on July 20, 2006, Judge Ricci carefully pointed to out to Mr. Lariviere that she and I do not have any social relationship, that we see each other only occasionally at Bar functions, and that our relationship is no different than the relationship which she has with other members of the Worcester legal community. A transcript of that proceeding and Judge Ricci's denial of that Motion, are attached hereto as *Exhibit K*.

15. On August 7, 2006, he filed a further Motion for Reconsideration of the Motion to Disqualify, an Affidavit in Support of the Motion for Reconsideration, and on August 21, 2006 filed a Motion for Report of Plaintiffs Counsel to Board of Bar Overseers and a Motion to Stay Proceedings, true and accurate copies of which are attached hereto as *Exhibits L, M*, and *N*, respectively. Both of these Motions were also denied by the Court, after hearing (see Judge Ricci's endorsements on *Exhibits L and N*).

16. In my judgment, all of Mr. Lariviere's claims are completely groundless, designed to cause delay and unnecessary expense, and to distract attention from the important issues of the divorce proceeding and of his criminal indictment.

SIGNED UNDER THE PAINS AND PENALTIES PERJURY THIS 4th DAY OF DECEMBER 2006.

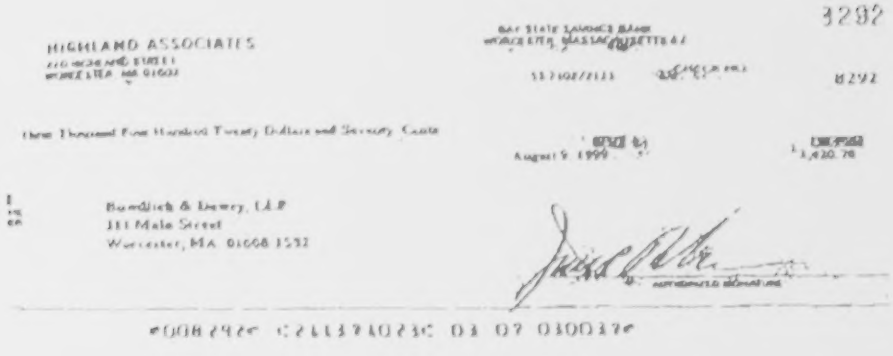
/s/ Michael P. Angelini
Michael P. Angelini, Esquire

APPENDIX II

Highland Associates

Supplier: Bowditch & Dewey, LLP
Check Date: August 9, 1999
Check No. 8292

Invoice Number: 121688
Date: 29-JUL-99
Identification: 121688
Amount to Pay: $3,420.70



8292

HIGHLAND ASSOCIATES

BAY STATE SAVINGS BANK

8292

August 9, 1999

$3,420.70

Bowditch & Dewey, LLP
311 Main Street
Worcester, MA 01608 1532

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
PROBATE FAMILY COURT

WORCESTER

Docket No. 03D 0524-DV1

HELEN LARIVIERE,
Plaintiff

vs,

RICHARD LARIVIERE,
Defendant

DEFENDANT'S MOTION TO REOPEN MASTER'S HEARINGS FOR THE PRESENTATION OF EVIDENCE

Now comes the defendant, Richard Lariviere, in the above captioned matter and [Illegible] Court to reopen master's hearings for the presentation of evidence. In support of this motion, the defendant states and avers that the Court has failed to apply the appropriate balancing test as required by *Wansong v. Wansong*, 393 Mass.154 (1985) and as a result his rights and guaranty of due process under the Constitution of the United States been abridged. The defendant asserts that by instituting a discovery sanction [Illegible] the defendant failed to attend his deposition, which was in essence an impermissible default judgment, the defendants rights to procedural due process were violated.

The constitutional guarantee of procedural due process "has always been understood to embody a presumptive requirement of notice and *a meaningful opportunity to be heard* before the State acts finally to deprive a person of his property." *Mullane v. [Illegible] Hanover Trust Co.*, 339 U.S. 306, 313; *Fuentes v. Shevin*, 407 U.S. 67, 82; *[Illegible] v. Connecticut*, 401 U.S. 371, 378. "This settled principle serves to ensure that the person threatened with loss has an opportunity to present his side of the story to a neutral decision maker at a time when the deprivation can still be prevented." *Fuentes v. Shevin, supra* at 81-82

COMMONWEALTH OF MASSACHUSETTS
PROBATE & FAMILY COURT

WORCESTER

Docket No. 03D-0524-DV1

HELEN LARIVIERE,
Plaintiff

vs.

RICHARD LARIVIERE,
Defendant

Filed Aug 22 2007

MOTION TO FOR RULINGS ON DEFENDANT'S OBJECTIONS TO THE MASTER'S REPORT

Now come the Defendant, Richard J. Lariviere, and he moves this Honorable Court for a ruling on the DEFENDANT'S OBJECTIONS TO THE MASTER'S REPORT. This Court has failed act on the Defendant's Objections to the Master's Report pursuant to the requirements of Mass. R. Dom. R. 53(h) (2).

Dated: August 22, 2007

10/18/07 20
Motion Allowed Denied

/s/ Susan D. Ricci
Judge of Probate Court

/s/ Wayne P. Tupper
Wayne P. Tupper, Esq.
27 West Mountain Street
Worcester, MA 01606
(508) 752-3150
BBO# 504390

CERTIFICATE OF SERVICE AND NOTICE OF MOTION

I, Wayne P. Tupper, Esq., hereby certify that I this day served a copy of the within MOTION TO FOR RULINGS ON DEFENDANT'S OBJECTIONS TO THE MASTER'S REPORT by the regular mails, postage prepaid, to Attorney Michael P. Angelini at Bowditch & Dewey, LLP, 311 Main Sheet, P.O. Box 15156, Worcester, MA 01615-0156 and to Attorney Joseph Liana Jr. at Mountain, Dearborn & Whiting, LLP, 370 Main Street, Worcester, MA 01608; and do give this notification that the within Motion is scheduled for hearing in the Worcester Probate and Family Court sitting in Marlborough on: September 6, 2007 at 9:00 AM or as soon thereafter as counsel may be heard.

Dated: August 22, 2007

/s/ Wayne P. Tupper,
Wayne P. Tupper, Esq.

COMMONWEALTH OF MASSACHUSETTS
PROBATE & FAMILY COURT

WORCESTER

Docket No. 03D-0524-DV1

HELEN LARIVIERE,
Plaintiff

vs.

RICHARD LARIVIERE,
Defendant

Filed 6-18-07

DEFENDANT'S MOTION TO REVOKE THE ORDER OF REFERENCE

Richard J. Lariviere, the Defendant in the above-captioned action for divorce, moves that the court revoke the Order of Reference entered by the court on July 27, 2006, which appointed Joseph Lian, Esq. as master in the above-captioned action and directed him to be hearing master pursuant to Mass. Dom. Rel. P. 53 with no further instructions.

On June 7, 2007, the master filed a report and made findings relative to material presented that does not conform to the rules of evidence and was highly prejudicial to the Defendant. The master also made findings as to the disposition of this divorce that were beyond the scope of the order of reference. The master also heard material that was objectionable if the discovery sanctions were not enforced in violation of the Defendant's constitutional rights and

his right not to be defaulted in a divorce action when lesser sanctions were available. The exposure of the master to this impermissible material has tainted the master, and he should no longer be considered a neutral fact finder.

WHEREFORE, the Defendant moves that the court revoke the Order of Reference previously entered herein and appoint a new master to hear evidence under a new Order of Reference and to report to the Court.

7/2/07 20
Motion Allowed Denied

/s/ Susan D. Ricci
Judge of Probate Court
Susan D. Ricci

APPENDIX J

FIRST AMENDMENT AN RESTATEMENT TO OPERATING AGREEMENT

This First Amendment and Restatement to Operating Agreement is dated as of the 30 day of November, 2002, by Richard J. Lariviere of Worcester, Massachusetts (such person being referred to as a "Member").

WHEREAS, Highland Associates of Worcester No. I, LLC (the "LLC") has been formed pursuant to the Delaware Limited Liability Company Act (the "Act") by the filing on August 22, 2001 of a Certificate of Formation in the office of the Secretary of State of the State of Delaware;

WHEREAS, Paragraph 22 (b) of the Operating Agreement executed on August 22, 2001 provides that the Operating Agreement can be amended with the consent of all of the Members;

WHEREAS, all of the Members have agreed to this First Amendment and Restatement to the Operating Agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein expressed, the parties hereto hereby agree to amend and restate the Operating Agreement as follows:

* * *

11. *Compensation. Reimbursement. Organization Expenses.*

(a) The compensation of the Manager shall be fixed from time to time by an affirmative vote of the Members, and no Manager shall be prevented from receiving such compen-

sation by reason of the fact that he is also a Member. Effective with the *first* day of the first month following the adoption of this Amendment, the Manager shall receive an amount equal to $400,000 per year, payable on in 12 equal monthly installments of $33,333.33, with payment due on the first day of each month. The Members agree that such payment constitutes reasonable compensation for services rendered by the Manager to the LLC as determined by Members. Notwithstanding the foregoing sentence, no amount of compensation shall be paid to the Manager if at such time the LLC is insolvent, or to the extent that such payment would cause the LLC to become insolvent. If any payment is not timely made, such payment will be accrued on behalf of the Manager and will be paid at the earliest time when the LLC is not insolvent, or when it will not become insolvent by reason of such payment. The compensation provided to the Manager under this subparagraph (a) shall constitute a "Guaranteed Payment(s)" (within the meaning of Section 707(c) of the Code), determined without regard to the LLC's income. except in the case of a Member being compensated for services rendered as a Manager or being compensated for other services rendered to the extent approved by the Members, no Member shall be entitled to compensation from the LLC for services rendered to the Company as a Member. Upon the submission of appropriate documentation each Member shall *be* reimbursed by the LLC for reasonable out-of-

pocket expenses incurred on behalf, or at the request of, the LLC.

* * *

21. *[Heading Name]*

(c) Upon dissolution of the LLC, one, or all, of the Class A Voting Members, or, if none, a liquidator elected by the written consent of the Manager shall liquidate the assets of the LLC, apply and distribute the proceeds thereof under the terms of this Agreement, and cause the cancellation of the Certificate.

* * *

22. *[Heading Name]*

(c) This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted, construed and enforced in accordance with the laws of the Delaware.